STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2000-015

DOWNTOWN REDEVELOPMENT PLAN PROJECTS

CITY OF VACAVILLE

I.
INTRODUCTION AND PROCEDURAL HISTORY

On October 20, 2000, the Director of the Department of Industrial Relations ("Director") issued a public works coverage determination finding that two redevelopment projects in downtown Vacaville were public works within the meaning of Labor Code section 1720(a).[1] The first project was a new office building ("Office Project") to be developed by Pacific Valley Development Co. ("Pacific Valley"). The second was a 220,000 square foot manufacturing and warehouse facility ("Mattress Plant") built for Simon Mattress Company ("Simon"). To induce development of these projects, the Vacaville Redevelopment Agency ("Agency") had agreed to pay certain fees to the City of Vacaville ("City") on behalf of the owners or developers. The Director concluded that these payments constituted payment for construction out of public

[1] Subsequent statutory references are to the Labor Code unless otherwise indicated.

funds within the meaning of section 1720(a).

On November 21, 2000, the Agency filed a timely administrative appeal of the Director's determination. In a letter dated December 15, 2000, Panattoni Development Company Northwest I, LLC and Panattoni Construction, Inc. (collectively "Panattoni"), the developer and contractor respectively for the Mattress Plant, associated themselves with the Agency's position in its appeal. In a letter dated January 18, 2001, Simon expressed agreement with the Agency's position. In a letter dated January 18, 2001, Pacific Valley argued for reversal of the determination. The Napa-Solano Counties Building & Construction Trades Council, which requested the determination, made no submission on appeal.

II.
ISSUES AND CONCLUSIONS ON APPEAL

The Agency's principal arguments[2] are as follows:

1. The Agency's payment of fees to the City does not trigger prevailing wage requirements because they were merely incentives to development that serve purely private needs.

2. Payment of City fees is not payment for construction because such fees do not involve any physical construction.

[2] The Agency raises several additional issues, which are addressed in the discussion below.

3. Payment of development impact fees does not trigger prevailing wage requirements because such fees go into funds for the construction of offsite improvements which are public works projects separate from the private projects at issue.

4. The Agency is not subject to the Labor Code's prevailing wage requirements because it is governed by a separate prevailing wage provision in Heath and Safety Code section 33423.

5. The Napa-Solano Counties Building & Construction Trades Council did not submit a proper request for coverage determination pursuant to the requirements of 8 California Code of Regulations ("CCR") sections 16001 and 16302.

Simon "concurs with and supports" the Agency's appeal. Panattoni agrees with the arguments advanced by the Agency, and joins in its request for a hearing. Additionally, Panattoni argues that:

1. They are "interested parties" within the meaning of 8 CCR section 16000, but were never formally notified of the determination of October 20, 2000 and did not have an opportunity to comment prior to that determination.

2. The Agency's contribution of fees associated with the Mattress plant was actually a loan, and the determination that it was payment for construction was premature.

3. Section 1720(a) must be narrowly construed so that interested parties can predict the public works consequences of their actions.

Pacific Valley contends that its project should not be subject to prevailing wage requirements because the Agency's contribution of plan check fees partially offsets the increased cost of development imposed by the requirements of the City's 1996 Policy Plan for the Basic American Food Site.

For the reasons discussed below, I find that:

1. Under the *McIntosh* analysis, the issue is not whether the development is under public or private ownership, but whether a public entity is paying public funds as opposed to forbearing or waiving fees or costs.

2. Section 1720(a) must be liberally construed to achieve the legislative purpose, and there is no basis for reading into it an implied limitation that public funds must be spent only for physical construction for there to be a finding of a public work.

3. The Agency's payment of development impact fees triggers prevailing wage requirements not because of the ultimate use of such fees to finance construction of public works, but rather because the fees are a mandatory cost of construction of the Mattress Plant. Moreover, the Agency's payment cannot be characterized as a loan.

4. The fact that the Health and Safety Code contains a prevailing wage requirement does not mean that the provisions of the Labor Code are inapplicable.

5. All interested parties have been provided an opportunity to participate in the appeal, and claimed procedural flaws regarding the determination and/or the request for it are not a basis for reversing the substantive legal conclusion.

6. No hearing is required because the material facts are not in dispute and the parties have raised only legal issues.

III.
RELEVANT FACTS

The Office Project

Approximately five years ago the Agency purchased a large parcel of land that had formerly been used as an onion processing facility ("Basic Site"). The Agency acquired the land for redevelopment for entertainment and office uses. The Disposition and Development Agreement ("DDA") between the Agency and Pacific Valley involves a small portion of the Basic Site. The DDA provides that the Agency will sell a 5.4 acre parcel to Pacific Valley for $1.1 million, and that Pacific Valley will develop a private office building thereon with its own funds. Pacific Valley is to pay $500,000 at the time of conveyance of the land, and $600,000 within one year after the conveyance. The Agency's

documents state that the purchase price is at least equal to fair market value and substantially more than the acquisition cost to the Agency.[3]

The DDA has provisions regarding certain City fees that are normally paid by property owners seeking to develop their land. These fees fall into two broad categories: development impact fees and plan check fees.[4] Development impact fees are defined in part as: "Fees reasonably related to impacts on city provided facilities and public improvements from development[.]" (Vacaville Municipal Code section 11.01.020(A).) The Municipal Code provides for

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[3] Based on the documentation provided by the Agency and additional market research, the initial determination found no reason to doubt the Agency's representation of fair market value. The Agency argued that even if the land sale were for less than fair market value, prevailing wage requirements would not be triggered. (Goldfarb & Lipman letter of May 12, 2000, citing *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576.) The determination noted that this Department does not agree with the Agency's premise, and under some circumstances would find that a below-market sale of public property would constitute payment for construction out of public funds. On appeal, the Agency asserts that this statement "leaves public agencies completely in the dark as to their obligations under the Labor Code in transactions involving disposition of interests in land at a 'below market' price or rent." (Letter of Appeal, p. 7.) The Agency therefore requests that the statement in the determination regarding below-market sales be withdrawn and that public agencies be informed that the Department "will not impose prevailing wage requirements on projects because of the land transaction until you have clearly what circumstances in what kinds of transactions will trigger prevailing wages.

In *McIntosh*, the court held that forbearance of rent was not payment out of public funds. However, the *McIntosh* analysis of what constitutes payment out public funds could encompass certain land sales. (See, e.g., Precedential Public Works Coverage Case No. 99-039, *Riverview Business Center Office Building D*, November 17, 1999.) For this reason, the Department cannot categorically withdraw the statement in the initial determination, nor can it enumerate all of the hypothetical scenarios in which a below-market land sale could constitute a payment for construction out of public funds. That issue must be determined on a case-by-case basis. The statement in the determination was intended to alert public agencies that they should proceed with caution in such transactions.

[4] Each of these broad categories includes several sub-categories. (*See* Vacaville Municipal Code section 11.01.020.)

payment of development impact fees by the property owner. (*Id.*, section 11.01.040(A).) However, another section provides for credits against the fees in cases where the land was previously developed. (*Id.*, section 11.01.070(D).) In this case, no development impact fees are contemplated because credits against development impact fees are available to Pacific Valley pursuant to this section. (DDA section 3.2(a).)

DDA section 3.2(b) further provides that the Agency will pay all plan check fees, which are estimated to total less than $60,000. Plan check fees, which cover the cost of City staff time needed to review building plans for code compliance, are required by Municipal Code sections 11.01.040 and 14.20.250.040.

The Mattress Plant

On February 8, 2000, the Agency entered into an Agreement with Simon providing for Simon to build a 220,000 square foot manufacturing and warehouse facility. The facility is to be constructed with private funds on land owned by Simon. To induce Simon to locate the facility in Vacaville, the Agency agreed to pay a portion of the City's plan check fees and development impact fees in excess of $434,654. The maximum Agency obligation is $230,000, and Simon is obligated to repay the Agency certain amounts if

the facility is not kept in operation for at least five years.

The fees are estimated to total $660,515, of which the developer has agreed to pay the first $434,654. The development impact fees include $31,480 for general facilities impact; $29,360 for police impact; $10,755 for fire impact and 405,240 for traffic impact. The plan check fees include, among other items, $16,022 simply designated as "plan check fee"; $500 for energy plan check; $4,300 for landscape plan check; $17,802 for "Building Fee"; and $826 for plumbing plan check.

V.
DISCUSSION

A. The Conclusion that the Agency's Payment of City Fees is a Payment Out of Public Funds is Consistent with the *McIntosh* Court's Distinction Between Payment and Forbearance.

The Agency first acknowledges that the initial determination is based on the conclusion that the Agency is a separate legal entity from the City of Vacaville, and that the payment by the Agency of fees to the City is not a "forbearance" within the meaning of *McIntosh*.[5] The Agency

[5] The Agency notes that as of the date of its appeal, the Office Project had not yet started construction and the Agency had not yet made any payments related to that project. It raises the possibility that the Agency's obligation to pay the fees for the project may be relieved by either an agreement that the developer pay the fees itself, or a decision of the City to waive the fees. The agency requests confirmation that if the Agency does not pay the fees for the project, prevailing wage requirements would not be triggered. The Agency's understanding is correct. The sole basis for the conclusion that the Office Project is a public work is the fact that the Agency is paying the fees out of public funds. In the absence of these payments by the

concedes that it is a separate legal entity from the City, but argues that this is not significant because the *McIntosh* court based its conclusion that a county's waiver of fees did not trigger prevailing wages on the fact that the waivers reflect the community's "incentives to development" that "serve purely private needs." (Letter of Appeal, p. 1, quoting *McIntosh, supra,* 14 Cal.App.4th at 1590.)

The Agency misconstrues the holding in *McIntosh*. Nothing in that opinion suggests that an actual payment of public funds as an incentive to private development would not trigger prevailing wage requirements. The court held that a mere forbearance is not such a payment:

> The full phrase here is "paid for in whole or in part out of public funds" (section 1720, subd. (a)). . . . The verb "pay," standing alone, can in its usual and ordinary sense include the transfer of things other than money. . . . Even "[i]n a more restricted legal sense[,] payment is the performance of a duty promise, or obligation . . . by the delivery of money or other value"—"the delivery of money or its equivalent . . . ." [Citation omitted.]

Agency, assuming no other payments out public funds were involved, the project would not be covered under the Labor Code.

The Agency further notes that the Mattress Plant is almost completed, and the City has credited on its books funds from Agency accounts to the City's fee accounts for the fees the Agency is obligated to pay in conjunction with that project. The agency suggests the possibility that the developer will agree to repay the fee amount to the Agency or that the City will decide to waive the fees and credit the amounts back to the Agency funds account. The Agency contends that if one of these possibilities occurs, there would be no Agency payment to trigger prevailing wages. This contention is untenable, as coverage must be determined according to the facts existing at the time the work is performed. Otherwise, the prevailing wage law could be easily circumvented by means of *ex post facto* revisions to or re-characterizations of transactions after the work has been completed and coverage has been found.

> However, the "payment" here must be "out of public funds" (section 1720, subd. (a)). . . . The dictionary defines ["funds"] as 'available pecuniary resources ordinarily including cash and negotiable paper' [citation], and in a legal context the courts have also taken it to include property of value which may be converted into cash . . . . [Citation.] The county's right to charge rent is not an available pecuniary resource like cash or some readily cash-convertible asset. *To take rent* collected *from one source and use it to pay obligations would plainly be a payment of public funds, but the County here will not collect the rent.* (*McIntosh, supra,* 14 Cal.App.4th at 1588, emphasis supplied.)

The court's distinction between payment and forbearance is directly on point here. When the Agency pays money to the City, it is not simply forbearing the collection of funds, but is in the court's words, "taking [funds] collected from one source and us[ing] it to pay obligations."

The Agency argues, however, that "it is not proper to use the legal separateness of the entities to make nonsensical distinctions." (Letter of Appeal, p. 2, citing *Nolan v. Redevelopment Agency* (1981) 117 Cal.App.3d 494; *Oceanside Marina Towers v. Oceanside Community Redevelopment Commission* (1986) 187 Cal.App.3d 735.) However, neither of the cases cited by the Agency suggests that the separate identities of the Agency and the City should be ignored in order to characterize payments by the former as forbearances

by the latter. *Nolan, supra,* simply stands for the proposition that citizen plaintiffs should not be denied their day in court merely because they did not name the correct entity in their complaint. In *Oceanside Marina Towers, supra,* 187 Cal.App.3d at 741, the court observed that:

> [I]t would be a colossal elevation of form over substance were we to rule that the running of the statute of limitations depended on which of two participating agencies filed a notice containing exactly the same information with exactly the same county clerk. This is particularly true where, as here, the Commission is the Oceanside City Council and acts as the alter ego of the City.

The present case is not analogous to the cases cited by the Agency. *McIntosh* makes it clear that the distinction between payment and forbearance is one not merely of form, but of substance and legal significance. The Agency, having chosen to make payments to the City, cannot obscure that distinction by now saying that the payments should be treated as forbearances.

B. Labor Code Section 1720(a) Must Be Liberally Construed to Achieve the Legislative Purpose, and There is No Basis for Reading Into it an Implied Limitation That Public Funds Must be Paid Only for Physical Construction For There to Be a Finding of a Public Work.

The Agency next contends that the payment of permit fees is not payment for construction. The Agency concedes that "payment of development and processing fees are a

necessary prerequisite for construction," but contends that the same can be said for many other pre-construction activities that do not involve any physical construction. (Letter of Appeal, p. 2.)

The *McIntosh* court acknowledged that: "Courts will liberally construe prevailing wage statutes [citations omitted], but they cannot interfere where the Legislature has demonstrated the ability to make its intent clear and has chosen not to act [citations omitted]."[6] (14 Cal.App.4th at 1589.) There is no language in section 1720(a) limiting construction "paid for in whole or in part out of public funds" to situations in which the public funds are paid directly for "physical construction," nor is there any indication of such a legislative intent. If that were the case, it could be argued that a project would not be a public work even if all of the construction materials were purchased with public funds so long as the construction labor itself was not paid for out of public funds.

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[6] Panattoni argues, however, that section 1720(a) must be narrowly construed so that parties can "predict the public-works consequences of their actions under reasonably precise criteria and clear precedent." (Letter of December 15, 2000, p. 2.) This argument must be rejected as contrary to the rule of liberal construction recognized by *McIntosh*. Moreover, the Department's regulations provide that: "Any interested party . . . may file with the Director of Industrial Relations . . . a request to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which the interested party believes may be subject to or excluded from coverage as public works under the Labor code." (8 CCR section 16001(a)(1). This is the established mechanism for parties to "predict the public works consequences of their actions." A party who elects to proceed with a project without first obtaining a coverage determination assumes the risk that another party may later request such a determination.

Moreover, nothing in *McIntosh* suggests such a limitation. There the court held that "a loan of public funds to finance bond premiums during private construction is not construction 'paid for' with public funds under section 1720, subdivision (a.). The public agency is not ultimately paying for the bond; the builder is." (14 Cal.App.4th at 1590.) A bond is no more "physical construction" than is a permit, yet had the public agency ultimately paid for it, that payment would have been sufficient to trigger prevailing wage requirements. The payment of public funds for all or part of the overall cost of building the project is all the statute requires.

Finally, the effect of the Agency's fee payments is addressed candidly in Pacific Valley's letter of January 4, 2001:

> [T]he entire 33-acre site, of which we are responsible for approximately 5.5 acres, is controlled by a Policy Plan for the Basic American Food Site, that was drafted and implemented in January of 1996. The 1996 Policy Plan is definitive in that it controls the color, texture, architectural style, lighting, tenant base, parking requirements and a myriad of other requirements contained within the body of the document. To meet the stringent guidelines imposed by the Policy Plan, requires substantially more capital and administration, but allows the municipality the ability to tightly control both quantity and the quality of the development as it takes place. *The fact that the agency agreed to participate in alleviating a portion of the burden imposed by these stringent design controls, allows this project to devote more funds to the enhancement of the structure and*

its surroundings to meet the criteria of the policy plan. (Emphasis supplied.)

Pacific Valley's comments demonstrate that the Agency's fee payments in fact subsidize the construction. This is entirely consistent with the conclusion that they constitute payment for construction out of public funds within the meaning of section 1720(a), and is inconsistent with the Agency's argument to the contrary.

C. The Agency's Payment of Development Impact Fees Triggers Prevailing Wage Requirements Not Because of the Ultimate Use of Such Fees to Finance Construction of Off-Site Improvements, But Rather Because the Fees are a Mandatory Cost of Construction of the Mattress Plant. Moreover, the Agency's payment cannot be characterized as a loan.

The Agency next argues that its payment of development impact fees for the mattress factory does not constitute payment for construction. It notes that these fees go into funds for offsite public improvements that are themselves subject to prevailing wage requirements, and that the Department has held in the past that the payment of public funds for offsite improvements does not trigger prevailing wage requirements for related private construction projects. The Agency cites as support for its argument Public Works Coverage Determination, Case No. 99-002, County of Sonoma, Valley of the Moon Boys & Girls Club, April 9, 1999. However, that decision has not been designated as precedential by the Department, and

therefore may not be cited as authority. (Gov. Code section 11425.60.) The Agency also cites two decisions formerly designated as precedential by the Department, Public Works Decision on Appeal, Case No. 94-034, City of Pismo Beach Redevelopment Agency (February 28, 1995) and Public Works Decision on Appeal, Case No. 93-012, Wal-Mart Shopping Center, City of Lake Elsinore (July 1, 1994).

The cases cited by the Agency are factually distinguishable from the case at hand. None of them involved a redevelopment agency's payment of construction-related fees to another governmental entity. In the Lake Elsinore case, the developer of a shopping center agreed to construct offsite improvements, and the redevelopment agency agreed to reimburse the developer, contingent on the shopping center generating sufficient tax revenues. Only the offsite improvements were at issue, and the Department held that they were public works. In the Pismo Beach case, the developer of a factory outlet center had agreed to construct both the center and adjacent offsite improvements with private funds. As the project was nearing completion, the developer requested financial assistance from the city or the redevelopment agency, and the agency agreed to reimburse the developer for the cost of the offsite improvements. The Department held that the reimbursement constituted a payment out of public funds for construction

of the public improvements. A significant difference between Pismo Beach and this case is that in Pismo Beach the project was begun without any contemplation of a public subsidy, so the subsequent reimbursement for offsite improvements was not an inducement for construction of the privately financed outlet center.

In the present case, the fact that the development impact fees go into funds that ultimately pay for future offsite public improvements is immaterial to the question of whether the Agency's payment of such fees as an inducement to development of a project constitutes payment for construction. In this context, the same analysis applicable to the payment of plan check fees is applicable here. The fees were a legally mandated cost of building the project that would normally be borne by the developer. The Agency's payment of these fees effectively subsidizes the construction, and thus constitutes a payment for construction out of public funds.

Panattoni argues, however, that the Agency's payment of fees related to the mattress factory must be characterized as a loan, because it was predicated on Simon's obligation to operate the facility in Vacaville for at least five years. Section 1, Paragraph C of the agreement between the Agency and Simon does in fact impose such an obligation on Simon, and provides a sliding scale of reimbursement

payments due the Agency if Simon closes the facility within the five-year period. Cessation in 2001 would result in reimbursement of $225,000. For each succeeding year, the reimbursement amount is reduced by $45,000, until 2005, when cessation would result in reimbursement of $45,000. However, the agreement further provides that: "The [Agency] may, at its sole discretion, waive the above reimbursement by [Simon] if it determines that such an action is in the best interest of the Agency and/or the City of Vacaville." (*Id.*)

The above provisions do not support the characterization of the Agency's fee payments as a loan. Civil Code section 1912 defines a loan of money as "a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which is borrowed. Here there is no agreement by Simon to return a sum equivalent to that which was paid by the Agency. All that Simon has to do to avoid a full reimbursement is to keep its new facility in operation for at least a year. Moreover, even if it fails to do so, the Agency has discretion to waive the reimbursement. The reimbursement provision is more in the nature of a liquidated damages clause than a loan repayment provision.[7]

[7] The term "liquidated damages" applies "when a specific sum of money has been stipulated by the parties to a . . . contract as the amount of damages to be recovered by either party for a breach of the agreement by the other." *Black's Law Dictionary* (Rev. 4th Ed.), p. 468.

D. The Fact that the Health and Safety Code Contains a Prevailing Wage Requirement Does Not Mean That the Provisions of the Labor Code are Inapplicable to Redevelopment Projects.

The Agency argues for the first time in its appeal that it is not subject to the Labor Code's prevailing wage requirements because the Community Redevelopment Law contains a different prevailing wage provision. (Letter of Appeal, p. 5.) Health and Safety Code section 33423 provides that:

> Before awarding any contract for such work to be done in a project, the agency shall ascertain the general prevailing rate of per diem wages in the locality in which the work is to be performed, for each craft or type of workman needed to execute the contract or work, and shall specify in the call for bids for the contract and in the contract such rate and the general prevailing rate for regular holiday and overtime work in the locality, for each craft or type of workman needed to execute the contract.

The principles of statutory construction do not support Agency's argument. A fundamental principle is that whenever possible, various parts of a statutory scheme should be harmonized and "significance should be attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose . . .." (*DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 17-19.) The considerations that apply when construing two provisions of the same statute also apply when construing two separate statutes addressing the same subject:

> "[I]t is well settled that the statutes and codes blend into each other, and are to be regarded as constituting but a single statute. [Citation.] One should seek to consider the statutes not as antagonistic laws but as parts of the whole system which must be harmonized and effect given to every section. [Citations.] Accordingly, statutes which are in *pari materia* should be read together and harmonized if possible. Even when one statute merely deals generally with a particular subject while the other legislates specially upon the same subject with greater detail and particularity, the two should be reconciled and construed so as to uphold both of them if it is reasonably possible to do so. [Citations.]" *Louisiana-Pacific Corp. v. Humboldt Bay Municipal Water District* (1982) 137 Cal.App.3d 152, 156-157, quoting *Natural Resources Defense Council, Inc. v. Arcata Nat. Corp.* (1976) 59 Cal.App.3d 959, 965; accord, *Brusso v. Running Springs Country Club, Inc.* (1991) 228 Cal.App.3d 92, 101-102.

The prevailing wage requirements in the Labor Code can and must be reconciled with those in the Health and Safety Code. The nature and purpose of the Labor Code's prevailing wage provisions were explained by the California Supreme Court in *Lusardi Construction Company v. Aubry* (1992) 1 Cal.4th 976, 985:

> The Legislature has declared that it is the public policy of California "to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." ([Labor Code section] 90.5,

> subd. (a).) The conditions of employment on construction projects financed in whole or in part by public funds are governed by the prevailing wage law. ([Labor Code sections] 1720-1861.)
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> The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects. (*O. G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 458 [127 Cal.Rptr. 799].) Subject to an exception not relevant here, under section 1720, subdivision (a), "public works" include "[c]onstruction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds . . .." Section 1771 provides that not less than the general prevailing rate of wages must be paid to all workers employed on public works projects costing more than $1,000. Section 1770 requires the Director to make the *prevailing wage rate determination*, based on a method defined in section 1773.

In contrast, Health and Safety Code section 33423 merely provides that "the agency shall ascertain the general prevailing rate of per diem wages in the locality in which the work is to be performed . . .." The Health and Safety Code provides no definition of the term of art "general prevailing rate of per diem wages," nor any criteria for how the rate is to be ascertained. Rather, the phrase is imported verbatim from the Labor Code, which in section 1770 assigns to the Director of Industrial relations the responsibility of determining the "general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773 . . .."

Thus, the Labor Code provides the necessary meaning and context for the phrase used in the Health and Safety Code. If the provisions of the latter were to apply to the exclusion of the former, they would be stripped of the meaning intended by the Legislature. Not only would there be no prescribed criteria or standards for agencies to use in ascertaining applicable rates, but there would be no recourse for interested parties wishing to challenge those rates. (Cf. Labor Code section 1773.4.) A "prevailing rate" could be whatever the agency wanted it to be, and Health and Safety Code sections 33423 and 33424 would be rendered essentially meaningless.

For these reasons, the prevailing wage provisions of the Health and Safety Code and the Labor Code must be read together as complementary parts of a comprehensive statutory scheme. While the Health and Safety Code requires the payment of prevailing wages on construction contracts awarded directly by redevelopment agencies (and related subcontracts), the Labor Code additionally requires prevailing wages on construction financed with public funds, including redevelopment agency funds.

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E. All Interested Parties Have Been Provided an Opportunity to Participate in the Appeal, and Claimed Procedural Flaws Regarding the Determination and/or the Request for It Are Not a Basis for Reversing the Substantive Legal Conclusion.

The Agency argues that there were procedural flaws in the coverage determination process. In particular, the Agency asserts that: "As far as we can tell, Mr. Franchimon [Business Manager of the Napa-Solano Counties Building & Construction Trades Council], who allegedly requested the coverage determination, never made a request for a determination." (Letter of Appeal, p. 5.) In fact, Mr. Franchimon wrote a letter to then Chief Deputy Labor Commissioner Richard Clark, inquiring whether prevailing wages could be required for certain redevelopment projects described in accompanying newspaper clippings. Mr. Clark subsequently asked Mr. Franchimon whether he wished to obtain a coverage determination, and Mr. Franchimon responded that he did. Mr. Clark then referred the correspondence to the Director. While Mr. Clark handled Mr. Franchimon's inquiry less formally than might be desired, this does not affect the substantive validity of the determination. Mr. Clark could have simply requested the determination himself, as the Labor Commissioner has done in the past. (*See* Precedential Public Works Coverage Determination, Case No. 92-029, City of Redlands/Honeywell Corporation, May 31, 1994.) Ultimately, the Director has

inherent authority to make a coverage determination on his or her own initiative (see *Lusardi Construction Co. v. Aubry, supra,* 1 Cal.4th at 988-989), so the fact that the determination resulted from an informal request is immaterial.

The Agency also asserts that "contrary to Sections 16001 and 16302 of your regulations, [the Franchimon letter] was never served on the Agency or anyone else." (Letter of appeal, p. 5.) 8 CCR section 16302 sets forth the procedure for petitions for review of wage determinations, and is not applicable to requests for coverage determinations. 8 CCR section 16001 does apply to the latter, and does direct the requesting party to serve the request on the awarding body. While Mr. Franchimon failed to do so, this omission was cured when the Department notified the Agency of his request and provided it with a copy of his letter. The Agency has not shown, or even alleged, that it suffered any prejudice from the asserted procedural flaws.

Unfortunately, it appears that Pacific Valley, Simon and Panattoni were not notified of the coverage determination request and accordingly did not respond to it. However, they have been given an opportunity to comment in the context of the instant appeal, and have availed themselves of that opportunity. They have not disputed any of the facts set forth in the determination, and their legal

arguments generally echo those of the Agency. Accordingly, these parties have shown no negative consequences, and their procedural objections are moot. (See Precedential Public Works Decision on Appeal, Case No. 99-037, Alameda Corridor Project, April 10, 2000.)

F. The Issue of Prospective vs. Retroactive Application is Beyond the Scope of the Coverage Determination, and is Appropriately Addressed to the Labor Commissioner.

The Agency argues that if the conclusions set forth in the coverage determination are upheld on appeal, they should apply prospectively only, so as to exempt any projects currently underway. This is an enforcement issue beyond the scope of the coverage determination. Enforcement of the prevailing wage law is the responsibility of the Labor Commissioner. (Section 1775 *et seq.*)

G. No Hearing is Required.

The Agency requests that the Director hold a hearing on its appeal. 8 CCR section 16002.5(b) provides that: "The decision to hold a hearing is within the Director's sole discretion. Because the material facts are undisputed, and the issues raised in the instant appeal are legal ones, there are no factual issues to be decided and no hearing is necessary.

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V.
CONCLUSION

The undersigned, having reviewed the administrative appeal filed by the Vacaville Redevelopment Agency and the submissions of the other interested parties, said appeal is hereby denied. This decision constitutes final administrative action in this matter.

Dated: 3/22/01

Stephen J. Smith
Director